FOR ARGUMENT

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No. 78-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT R. WILLIAMS, et al.,

Appellants,

v.

LEILA G. BROWN, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

This case was tried below on the appellees' theory that the Fourteenth and Fifteenth Amendments do not require a finding of purposeful discrimination before the use of multi-member electoral districts may be held unconstitutional. The district court accepted the appellees' constitutional theories, holding that *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), are inapplicable to so-called "voter dilution" cases.

On that basis, the court held that Mobile County's 140-year commitment to at-large election of its school commissioners was unconstitutional, not because of the state's *purpose* in establishing or maintaining the system but because of its *effects* on black voting strength, applying as the governing precedent the Fifth Circuit's decision in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd per curiam on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976).

In a summary decision the court of appeals affirmed with just one citation—its earlier decision invalidating the at-large election of the Commissioners of the City of Mobile, *Bolden* v. *City of Mobile*, 571 F.2d 238 (5th Cir. 1978), *prob. juris. noted*, No. 77-1844 (Oct. 2, 1978). In *Bolden* and its three companion cases the court of appeals held that the *Washington* v. *Davis* requirement of purposeful discrimination applies to voting dilution cases but that this requirement is necessarily satisfied by an affirmative determination under the criteria the court had laid out in *Zimmer*.

As we demonstrated in our opening brief, the errors of the courts below are manifest. The *Zimmer* criteria, whose purported satisfaction was without question the basis of the district court's judgment and the court of appeals' affirmance, are inconsistent with the decisions of this Court holding that state action violates the Fourteenth or Fifteenth Amendment only if it is purposefully discriminatory. Even if the *Zimmer* criteria were assumed to be proper guides to decision, the district court's findings on these criteria are fatally flawed; the findings were premised almost exclusively upon the existence of racially polarized voting, which is properly only the beginning point of the analysis and not the "something more" that the court of appeals indicated in *Bolden* that each *Zimmer* factor is supposed to provide, and the

findings improperly gave no weight to Alabama's long-term, 140-year commitment to the at-large election of Mobile County school board members. If proper constitutional principles are applied, as reflected in this Court's decisions in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and *White* v. *Regester*, 412 U.S. 755 (1973), there is no basis for a finding that the at-large election of the Mobile County school commissioners offends the Constitution. The appellees did not show either that Alabama's decision that the commissioners should be elected at large resulted from a racially motivated effort by the state to submerge black voting or that black voters had been deliberately excluded by the state from the political process, which exclusion could be remedied by the replacement of at-large voting with single-member districts.

Perhaps recognizing the infirmities of the decision below, the appellees now almost wholly ignore the *Zimmer* analysis, upon which their success below was based, and attempt to recast the case before this Court. The appellees now argue alternatively that the case should be decided on statutory grounds under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, a ground not considered by either court below, or that the district court in fact found purposeful discrimination against blacks in the state's *maintenance* of at-large elections. Appellees also argue, equally unsuccessfully, that *Washington* v. *Davis* is inapplicable to voting dilution cases. Finally, they argue that the decision below can be sustained by the Fifteenth Amendment, which allegedly prohibits at-large election systems having a discriminatory *effect*, without regard to any discriminatory state purpose.

In an amicus brief, the United States acknowledges that only purposeful state discrimination may be found to violate the Fourteenth Amendment but argues, with the appellees, that this requirement is satisfied by a district

court finding of purposeful discrimination in the *maintenance* of the at-large electoral system. Alternatively, the United States argues that the decision may be sustained under the Fifteenth Amendment, which it is claimed prohibits at-large electoral systems if, among other formulations, such electoral systems "are official action that enhances the effects of private racial bias in voting and that unfairly cancels out black voting strenth." (U.S. Amicus Br. 85.) The United States disparages, by mentioning without endorsement, the appellees' contention that the case should be decided in their favor on the basis of Section 2 of the Voting Rights Act.

The range and variety of the arguments offered by the appellees and the Government should not confuse the issues actually presented. In the sections that follow, we show (1) that the appellees litigated this case on constitutional theories different from those they now advance and, after prevailing on those infirm theories, cannot recast the case in this Court; (2) that, notwithstanding the arguments advanced by the appellees and the Government, both the Fourteenth and the Fifteenth Amendments require a finding of purposeful state discrimination to support a judgment that the at-large election of Mobile County school commissioners is unconstitutional; (3) that the opinion of the district court cannot reasonably be construed as making or supporting the necessary finding of purposeful state discrimination; and (4) that the appellees' belated claim based on Section 2 of the Voting Rights Act is groundless.

ARGUMENT

I. THE APPELLEES LITIGATED AND PREVAILED ON THE GROUND THAT THEY HAD SATISFIED THE REQUIREMENTS ARTICULATED IN *ZIMMER*, UNDER WHICH A DISCRIMINATORY PURPOSE IS CONSIDERED EITHER UNNECESSARY OR CONCLUSIVELY PRESUMED IF THE *ZIMMER* CRITERIA ARE SATISFIED.

Perhaps the most striking aspect of the appellees' brief is its failure to acknowledge the significance of *Zimmer* to their success below. In marked contrast to their brief in the court of appeals, the appellees' brief in this Court mentions *Zimmer* only once, and there only in response to our characterization of the basis of the decision of the court of appeals below. (Appellees' Br. 33-34.)

Although for obvious reasons the appellees and the United States would rather ignore *Zimmer*,[1] there is no doubt that the appellees litigated and prevailed below on the theory that the *Zimmer* criteria governed a determination of the constitutionality of the at-large election of Mobile County school commissioners, and that *Zimmer* and other voting dilution cases did *not* require an independent showing of purposeful state discrimination. As we noted in our main brief, the emphasis on the effect and not the purpose of the at-large election of school commissioners was evident in the appellees' complaint, their amended complaint and their contribution to the joint pretrial statement. (Appellants' Br. 6.) The appellees' response to this elementary point is weak and unpersuasive.[2]

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[1] In East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) (*per curiam*), this Court, reviewing *Zimmer*, sharply criticized the court of appeals' opinion.

[2] The appellees assert that their "complaint is phrased with sufficient breadth to encompass either claim" (Appellees' Br. 32), *i.e.*, a claim of unconstitutionality based on discriminatory purpose or a claim based on mere effects, but they supply no

(footnote continued)

Nor is there any doubt that the district court's decision was premised on the analysis prescribed in *Zimmer*, which the court viewed as *not* requiring a showing of a discriminatory state purpose. Thus, the district court stated that "*Washington* did not overrule [this Court's voting dilution precedents] nor did it establish a new Supreme Court *purpose* test. . . ." (J.A. 34a.) (Emphasis in original.) Rather, the court applied what it understood to be "[t]he controlling law of this Circuit . . . enunciated by Judge Gewin in *Zimmer*" (J.A. 36a), which, as we showed in our opening brief, was predicated solely on the effects of an at-large voting system, not its purpose (Appellants' Br. 25-26). On the basis of *Zimmer*, the trial court concluded:

> "The evidence when considered under these teachings convinces this court that the at-large districts 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' *Whitcomb*, 403 U.S. at 143, and *Fortson*, 379 U.S. at 439, and 'operates impermissibly to dilute the voting strength of an identifiable element of the voting population.'

(footnote continued)
record reference to the language of the complaint that allegedly presented such an issue of intent. They also assert that their "Pretrial Proposed Findings of Fact and Conclusions of Law" presented the intent issue. In this document the appellees argued *Zimmer* and discriminatory effects at length and, in a few additional pages, did what they could to avoid the impact on their case of *Washington v. Davis*, which had come down three months before the document was filed. Presumably the appellees would not press their reliance on this pleading too far, for in it they told the district court what they now deny—that *Washington v. Davis* "very clearly requires this Court to find discriminatory intent as one of the elements of any successful Fourteenth or Fifteenth Amendment claims. . . ." (P. 28.) Utilizing the *Zimmer* mode of analysis that the appellees advanced throughout the case but not following them in this single afterthought argument, the district court drew no such conclusion from *Washington v. Davis* and made no such finding.

> *Dallas*, at 480. The plaintiffs have met the burden cast in *White* and *Whitcomb* by showing an aggregate of the factors catalogued in *Zimmer*." (J.A. 41a.)

The appellees also relied heavily on *Zimmer* in their brief to the court of appeals, arguing that the court could even summarily affirm the district court judgment since "[t]he district court's lengthy findings carefully follow the directions this Court has given for consideration of claims that multi-member districts unconstitutionally dilute minority voting strength." (Appellees' Court of Appeals Br. ix.)[3] The court of appeals did summarily affirm, declaring that "Judge Pittman has applied the proper standards for evaluating plaintiffs' contention that the election of school commissioners on an at-large basis dilutes the votes of black citizens," and citing only its decision in *Bolden* v. *City of Mobile*, 571 F.2d 238 (5th Cir. 1978). (J.A. 2a.)

[3] A reading of the appellees' brief to the court of appeals leaves no doubt of their fundamental reliance on *Zimmer* in that court. The first "issue presented" listed in the appellees' court of appeals brief was "[w]hether the thorough findings of fact by the district court, carefully and explicitly considering each of the primary and enhancing factors prescribed in *Zimmer* v. *McKeithen*, . . . are clearly erroneous under Rule 52(a), F.R.C.P." (Appellees' Court of Appeals Br. 3.) In introducing the district court's findings, the appellees represented that the "court weighed the evidence by careful application of the standards in *Zimmer* v. *McKeithen*" (*id.* at 9), and in their Summary of Argument the appellees justified their assertion that the case did "not present any novel questions" with the claim that the district judge had "reached his decision by diligently following, step by step, the instructions this court has given in *Zimmer* v. *McKeithen*, *supra*, for analyzing multimember districts in light of past and present political realities" (*id.* at 27). The *Zimmer* decision itself was cited 17 separate times in the 42-page Argument section of the appellees' brief.

In our opening brief, we explained that the court of appeals' decision can best be understood by reference to its earlier decisions in *Bolden* and a companion, *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir. 1978). (Appellants' Br. 36-42.) The lack of congruence between what actually happened below and the appellees' current version of what happened below is well illustrated by their discussion of this seemingly noncontroversial point. In *Nevett* v. *Sides* and three companion cases, including *Bolden*, the court of appeals carefully and deliberately undertook a re-examination of *Zimmer* in the light of *Washington* v. *Davis* and *Arlington Heights*. It concluded that purposefulness is an element of either a Fourteenth Amendment or a Fifteenth Amendment violation in a voting dilution case but that the court had acted so presciently in devising the *Zimmer* criteria that their satisfaction adds up to the required purposefulness. That is how any reader of the four opinions, *Nevett* v. *Sides*, *Bolden* and the two others, would understand them. Yet the appellees blandly talk as if *Nevett* v. *Sides* and *Bolden* were only distantly related if at all and as if nothing very much had been decided in either case in any event. (Appellees' Br. 33-34.) What they say cannot be taken seriously, even as advocacy.

As for the appellees' suggestion that the citation of *Bolden* did not mean that the different panel of the court of appeals in this case adopted the equation of the *Zimmer* criteria with the requisite finding of intent, that may be so. It seems unlikely, but it may be so. But we meant by our explanation of the citation to be generous to the court and to the appellees' case. If the court of appeals in this case did not mean to endorse the *Zimmer*-equals-intent holding of *Bolden*, it must have been affirming the district court on its own terms, and that entails an error more elementary than the one we ascribed to it: a failure even to recognize that purpose is required in voting dilution

cases and a reliance on the *Zimmer* criteria for what they originally were—indicia of whether the *effects* of at-large voting have been unconstitutionally discriminatory.

The short of it is that the appellees embraced the *Zimmer* criteria in the tribunals where those criteria are cherished and now attempt to disown them in this tribunal where, quite understandably, the appellees fear that *Zimmer* is in disrepute. The appellees' desire to prevail on whatever grounds are thought likely to appeal to the court then hearing their case, regardless of what has gone before, does not justify their rewriting of history.

II. BOTH THE FOURTEENTH AND FIFTEENTH AMENDMENTS REQUIRE A FINDING OF PURPOSEFUL STATE DISCRIMINATION.

We demonstrated in our opening brief that both the Fourteenth Amendment and the Fifteenth Amendment require a finding of purposeful discrimination by the state as a predicate for a finding of a constitutional violation. (Appellants' Br. 28-35.) The United States agrees, at least with respect to the Fourteenth Amendment, stating in its *amicus* brief:

> "In *Washington* v. *Davis*, *supra*, this Court held that official action will not be held unconstitutional solely because it has a racially disproportionate effect. To establish a violation of the Equal Protection Clause, the Court held, proof of a discriminatory purpose must be shown. We agree with the view expressed by the Fifth Circuit in *Nevett* v. *Sides*. . . that this proposition applies to all Fourteenth Amendment racial discrimination claims, including those involving vote dilution." (U.S. Amicus Br. 51-52.)

The position of the United States with respect to the Fifteenth Amendment is less easily understood. At one point in its brief it says:

> "We submit . . . that the judgments in these cases also may properly be affirmed by this Court under the Fifteenth Amendment, without reaching the Equal Protection Clause claims, so long as the Court accepts the findings of the courts below that the electoral schemes here are official action that enhances the effects of private racial bias in voting and that unfairly cancels out black voting strength." (U.S. Amicus Br. 85).[4]

To the extent that the United States' position is that discriminatory intent by the state is not necessary to a Fifteenth Amendment violation, we disagree.

The appellees contend that a showing of purposeful state discrimination is unnecessary for either Fourteenth or Fifteenth Amendment purposes. (Appellees' Br. 36, 55.) As we show below, this position is plainly without merit.

A. The Fourteenth Amendment

The appellees' brief in this case refers to their brief in *Bolden* for development of their argument that "proof of discriminatory motive is not necessary under *White* and *Whitcomb*." (Appellees' Br. 36) That argument is largely premised on the view that this Court's decisions in *White* v. *Regester*, 412 U.S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), do not require a finding of purposeful

[4] As explained below, this quotation is only one of a number of articulations of the Government's position. See pp. 15-16, *infra*.

discrimination. (Appellees' Br., No. 77-1844, pp. 53-61.)[5] But, as we showed in our opening brief, there is no inconsistency between this Court's recognition of the intent requirement in *Washington* v. *Davis* and its decisions in *White* and *Whitcomb*. (Appellants' Br. 56-60.) These latter cases permit invalidation of an at-large electoral system *only* if the system results from purposeful discrimination by the state or a remedy is needed for the deliberate exclusion of racial minorities from the electoral process.

Neither condition is satisfied here. We demonstrated in our opening brief that there is no basis on which the district court could have found that the century-and-a-half commitment by Alabama to the at-large election of Mobile school board members was the product of racial

[5] The appellees also argue that one can infer that discriminatory intent is not required in the "voter dilution" cases from the alleged facts (1) that the *Reynolds* v. *Sims* apportionment cases do "not rest on any malicious intent to disenfranchise" certain voters and (2) that the apportionment cases and the "voter dilution" cases are part of the same "branch" of equal protection law. (Appellees' Br., No. 77-1844, pp. 58-61.) The Government also tries to assimilate the voting dilution cases to the reapportionment cases. (U.S. Amicus Br. 40-42, 71.) The only relationship between the two types of cases is the coincidence that each involves electoral districting. At-large elections, which most commonly give rise to claims of voting dilution, cannot, taken by themselves, fail to satisfy the one-person, one-vote criterion of *Reynolds* v. *Sims:* all persons within an at-large district cast votes of equal weight. Moreover, the reapportionment cases do not entail any inquiry into the purpose, malicious or benign, of the legislature for the reason that the state discrimination is apparent from the enactment itself, a reason that does not apply to an at-large electoral system.

animus (Appellants' Br. 60-61),[6] and we shall show below that the appellees' claim of a district court "finding" that Mobile County's at-large electoral system for its school commissioners is maintained by the state for discriminatory purposes is erroneous (see pp. 17-20, *infra*). As developed in our initial brief, neither is there evidence that Mobile County blacks have been excluded from the process of electing school board members by means such as the white slating mechanism found to exist in *White* v. *Regester*. (Appellants' Br. 62-63.)

The appellees and the United States urge that the existence of "bloc voting" may itself be viewed as equivalent to a formal barrier to effective political participation by black voters in Mobile County and thus invoke the rationale applied by this Court in *White* v. *Regester*. Thus, the appellees claim that "white bloc voting is the keystone of a dilution case under *White* and *Whitcomb*." (Appellees' Br. 37.) The United States argues that the "immediate instrumentality by which whites assure that blacks will be denied representation is racially polarized bloc voting in Mobile" and that the election process in Mobile County "is the exact analogue of the exclusionary slating process" considered in *White* v. *Regester*. (U.S. Amicus Br. 62-63.)

[6] As in so many other municipal governments, at-large election of Mobile County school commissioners has long been the preferred method of election—in this case for over 140 years—reflecting not racial bias or prejudice but a commitment to a less partisan and parochial selection of public officials. As we discussed at greater length in our opening brief, municipal governments often use such at-large electoral systems to promote city-wide attitudes on the part of the public officials. (Appellants' Br. 64-69.) The needs of local governments require flexibility and justify the application of standards different from those that might be applied in assessing the appropriateness of at-large elections for state legislators.

As we explained in our opening brief, the law is clear that such racially polarized voting does not make out a constitutional violation. These arguments amount to a claim either that minority voters or candidates have constitutional protection from the "unfortunate practice" of "voting for or against a candidate because of his race," a claim expressly rejected in the prevailing opinion in *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 166-67 (1977),[7] or that racial minorities are entitled to proportional representation, a claim rejected in *Beer* v. *United States*, 425 U.S. 130, 136 n.8 (1976). (Appellants' Br. 42-43.)

The district court expressly found that "[t]here are no formal prohibitions against blacks seeking office in Mobile County," that "blacks register and vote without hindrance," that "black[s] and whites participate in both parties," (J.A. 12a), and that "[a]ny person interested in running for school commissioner is able to do so" (J.A. 36a). These findings are in marked contrast to those made in *White* v. *Regester*.[8]

[7] In our opening brief (*e.g.*, p. 43) we mistakenly referred to this language from Mr. Justice White's opinion in *United Jewish Organizations v. Carey* as an expression of the Court. The appellees quite correctly emphasize that this portion of the opinion announcing the judgment of the Court was joined by only two other Justices.

[8] For example, the district court in *White* relied for its finding that blacks in Dallas County had been "effectively excluded from participation in the Democratic primary selection process" on the existence of a white-dominated slating organization that "without the assistance of black community leaders, decides how many Negroes, if any, it will slate in the Democratic primary." Graves v. Barnes, 343 F. Supp. 704, 726 (W.D. Tex. 1972) (three-judge court). By contrast, as explained in our initial brief, the record in the instant case indicates that there is no effective white-oriented slating organization at all, and that the only effective political organization in Mobile County primaries is the Non-Partisan Voters League, a local black endorsing organization. (Appellants' Br. 47.) Nor was there any evidence in the instant record of any other barriers, formal or informal, to blacks becoming candidates for the Mobile County school board. (*Id.* at 46-49).

Apparent appeals to racial prejudice made in some Mobile County political campaigns that appear in the record have been skillfully marshalled by the appellees in their brief. (Appellees' Br. 39-41.) The division of the County into "safe-white" and "safe-black" districts will presumably diminish such appeals (though it will not affect at all the attitude that they manifest). As the appellees and the Government note (Appellees' Br. 32; U.S. Amicus Br. 47), a state acts unconstitutionally if it purposefully discriminates against a minority by deliberately choosing to have an electoral system in which such appeals will surely succeed in submerging the minority vote. But, under this Court's precedents, a state that has not acted with the deliberate design to discriminate against the minority voter or minority candidate has no federal constitutional obligation to create an electoral situation in which such appeals will not have that effect. The arguments of the appellees and the Government concerning the significance of bloc voting in Mobile County are refuted by those precedents.

B. The Fifteenth Amendment

The appellees' argument, primarily developed in the *City of Mobile* case, that the Fifteenth Amendment "does not require a showing of racial motive or purpose" (Appellees' Br., No. 77-1844, p. 83) can be dealt with briefly. The appellees' references to the Congressional debates preceding ratification of the Fifteenth Amendment (*id.* at 87-90) are entirely consistent with the view that where, as here, a state legislative enactment is neutral on its face, the *state* may be said to have "denied or abridged" the right to vote "on account of race, color, or previous condition of servitude" only if the neutral state enactment was the product of purposeful state discrimination or is administered with a discriminatory design. This view is also entirely consistent with the case principally relied upon by the appellees—*Lane* v. *Wilson*, 307 U.S. 268

(1939)—as we have already demonstrated in our principal brief. (Appellants' Br. 34-35.) The claim that the court in *Lane* did not perceive or attach significance to the obvious racial discrimination inherent in the state's successor to the invalidated "grandfather clause" is untenable.

The United States suggests a novel, and puzzling, interpretation of the Fifteenth Amendment. While acknowledging that "[n]early all of this Court's cases decided under the Fifteenth Amendment have involved challenges to laws enacted or administered with a clear discriminatory intent" (U.S. Amicus Br. 90), the United States nevertheless suggests that such discriminatory state intent may not be required in certain circumstances. Just what those circumstances may be is not at all clear from its brief. In one formulation of its proposed standard, the Government suggests that a discriminatory state purpose is not essential to a Fifteenth Amendment claim if the court finds "official action that enhances the effects of private racial bias in voting and that unfairly cancels out black voting strength." (*Id.* at 85.) At other points the Government's brief suggests that an electoral system may be found to be in violation of the Fifteenth Amendment if it "facilitates" (*id.* at 87), "maximizes (*id.* at 89, n. 54), "promotes" (*id.* at 95, citing *Anderson* v. *Martin*, 375 U.S. 399, 404) or "magnifies" (*id.* at 95-96, n.58) private discrimination. These words apparently are used interchangeably, although their commonly understood meanings are quite different. Nor is this the only aspect of the Government's formulation that is inexplicably varied. Thus, the proposed requirement that the electoral system "unfairly cancels out black voting strength" (*id.* at 85) is later modified, without explanation, to require that the result be "elections in which blacks have no effective opportunities to elect candidates of their choice" (*id.* at 88).

The variety of formulations offered by the Government to describe its theory of the standard of decision under the Fifteenth Amendment reflects both the novelty of the theory urged and the extreme difficulty in applying the proposed standard(s) in subsequent cases. Apart from this, any claim that a discriminatory purpose by the state is not necessary to make out a violation of the Fifteenth Amendment is at odds with the plain language of the Amendment and with this Court's decision in *Terry* v. *Adams*, 345 U.S. 461 (1953), the decision on which the Government principally relies.

The Fifteenth Amendment provides that the rights of citizens to vote "shall not be denied or abridged *by the United States or by any state* on account of race, color, or previous condition of servitude." (Emphasis added.) The reasons underlying the requirement of purposeful discrimination as a basis for a finding of a Fourteenth Amendment violation by the state apply with full force to findings under the Fifteenth Amendment. To the extent that the state action is neutral on its face—as is an at-large election law—it cannot be said that the *state* has denied or abridged any voting rights "on account of" race unless there is evidence of discriminatory intent. (See Appellants' Br. 30.)

Terry v. *Adams* is entirely consistent with this principle. That case involved the white-only "Jaybird Association," which had been in existence since 1889 as an undisguised effort to exclude blacks from the political process in Texas. The Court held that the operation of this Association along with the Democratic Party involved the state to such an extent as to justify the conclusion that there was the requisite state action. As Mr. Justice Frankfurter—who characterized the case as "by no means free of difficulty," 345 U.S. at 472—stated in his separate opinion, "[i]f the Jaybird Association . . . is a device to defeat the law of Texas regulating primaries, and if the

electoral officials, clothed with State power in the county, share in that subversion, they cannot divest themselves of the State authority and help as participants in the scheme." *Id.* at 475-76. Justice Frankfurter immediately followed this statement with an observation confirming his view of the purposeful state discrimination inherent in the Texas Jaybird system: "Unlawful administration of a State statute fair on its face may be shown 'by extrinsic evidence showing a *discriminatory design* to favor one individual or class over another not to be inferred from the action itself,' " citing *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944). *Id.* (emphasis added).

In short, the hidden meaning of *Terry* urged by the United States is not there. The state's participation in the scheme in *Terry* was knowing and purposeful. As in other Fifteenth Amendment cases, in *Terry* the discriminatory purpose was "painfully apparent." (U.S. Amicus Br. 74, citing *Nevett* v. *Sides*, *supra*, 571 F.2d at 220).

III. THE DISTRICT COURT'S OPINION CANNOT REASONABLY BE READ AS FINDING THAT THE STATE MAINTAINED THE AT-LARGE ELECTION OF MOBILE COUNTY SCHOOL COMMISSIONERS FOR A DISCRIMINATORY PURPOSE.

Neither the appellees nor the United States argues that the state law governing the election of members of the Mobile County school board was adopted with a discriminatory purpose. However, in an obvious effort to recast the litigation to make it more nearly consistent with *Washington* v. *Davis*, both the appellees and the United States argue that the case was decided below, at least in part, on the ground of a "present purpose" to "maintain" a discriminatory system. The appellees go so far as to assert:

> "[T]he district court found . . . that Mobile's [at-large election] system is being maintained be-

> cause of a 'present purpose' to discriminate against black voters and to prevent the election of black members of the board. The record fully supports the findings below." (Appellees' Br. 17-18)

They even urge that the case is one of concurrent findings of fact by two courts that this Court under its traditional policy should not review. (*Id.* at 15-16.)

There are no such findings as the appellees urge. There is not even, on any fair reading of the district court's opinion, any such conclusion. In the passage to which the appellees refer the district court did no more than refer to a possible alternative ground of decision on which it chose not to rest.[9]

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[9] The appellees rely on portions of two sentences of the district court's opinion, which sentences occur near the end of the court's nine-page explanation of why it believed that *Washington* v. *Davis* does not require a showing of purposeful discrimination in voting dilution cases. These two sentences and the district court's concluding paragraph that immediately ensues are as follows:

> "It is not a long step from the *systematic exclusion of blacks* from juries which is itself such an 'unequal application of the law ... as to show intentional discrimination' ... and the deliberate systematic denials to people from juries because of their race ... to a present purpose to dilute the black vote as evidenced in this case. There is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes*. *Washington*, at 2048.
>
> "More basic and fundamental than any of the above approaches is the factual context of *Washington* and this case. Initial discriminatory purpose in employment and in redistricting is entirely different from resulting voter dilution because of racial discrimination. Washington's failure to expressly over-

(footnote continued)

—The sentences occur *not* in the district court's "Findings of Fact" section, but in an introductory portion of the "Conclusions of Law" section.

—The court's remarks even in this "Conclusions of Law" section were not in response to any request by plaintiffs for a "finding" that the at-large election of possible school commissioners was unconstitutional because of any "present purpose" to maintain the system to discriminate against blacks.

—The court's statement is not supported by any discussion of facts that were intended to or would support a finding of such discriminatory action by the state.

—The statement occurs in the penultimate paragraph of the district court's *nine-page* effort to distinguish this Court's decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), an effort that would have been unnecessary if the court was prepared to find that the at-large election system was the product of a discriminatory purpose by the state.

—In fact, the statement is immediately followed by the district court's rejection of "any of the above approaches" in favor of a conclusion that this Court's decision in *Washington* "did [not] establish a new Supreme Court *purpose* test...." (J.A. 34a.) (Emphasis in original.)

(footnote continued)

> rule or comment on *White*, *Dallas*, *Chapman*, *Zimmer*, *Turner*, *Fortson*, *Reynolds*, or *Whitcomb*, leads this court to the conclusion that *Washington* did not overrule those cases nor did it establish a new Supreme Court *purpose* test and require initial discriminatory purpose where voter dilution occurs because of racial discrimination." (J.A. 34a.) (Emphasis in original.)

Indeed, the consideration the district court gave to this issue contrasts markedly with the analysis that the United States suggests must be made in such a case. Thus, for example, the United States concludes that "a defendant's evidence of substantial nonracial purposes served by taking or continuing the particular state action in question should be weighed by the court against plaintiff's evidence indicative of improper racial purpose before the ultimate finding of invidious discrimination (or lack thereof) is made." (U.S. Amicus Br. 57.) It is apparent that the district court conducted no analysis directed to the inherently difficult question whether any legislative inaction in this case was motivated by a discriminatory purpose.[10]

[10] For proof of discriminatory intent, the appellees heavily rely on the tangled history of two proposals to modify Mobile County's at-large electoral system considered by the Alabama legislature during the pendency of this litigation. The claim by the appellees is that these legislative proposals were devised by the school board as part of a strategy "to interfere with any prompt judicial resolution of this case by procuring the introduction or passage of deliberately defective state legislation. . . ." (Appellees' Br. 7.) The appellees argue strenuously that the alleged bad faith of the school board and its counsel in litigating this case is, somehow—the connection is never made clear—directly supportive of their claim that the district court "found" the maintenance of at-large elections to be the result of purposeful discrimination by the state.

The appellees' effort to buttress their case with the discussion of the abortive legislation (and of school board actions that followed the district court's districting orders, Appellees' Br. 20-31) is unavailing. Most basically, whatever the truth of the appellees' claims of bad faith—and the appellees' summary of the "facts" is plainly unfair to the appellants—the implicit representation that the district court based its decision on them is certainly wrong. Notwithstanding the appellees' characterizations, there is no indication in the trial judge's opinion that he considered these matters significant to his factual findings on the appellees' case. Indeed, the circumstances involving these legislative proposals were mentioned by the judge only in the "Conclusions of Law" section of his opinion, and then only to

(footnote continued)

IV. THE APPELLEES' BELATED STATUTORY CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 ARE WITHOUT MERIT.

Perhaps recognizing the frailties of their constitutional theories, the appellees open their argument in this Court with a statutory contention that they never made below. They argue that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, should be construed to grant them a private right of action *broader* than their rights under the Fourteenth and Fifteenth Amendments, *i.e.* a right to have an at-large electoral system dismantled as unconstitutional because of its effects on the candidacies of blacks. The Government significantly makes no such argument. The failures of the appellees' argument can be briefly stated.

In the first place, whatever its merits, the appellees' statutory argument comes too late for proper consideration by this Court. The appellees concede that neither court below considered the statutory claim (Appellees' Br. 12), but they do not add that at no time did they urge any distinction between a cause of action under Section 2 of the Voting Rights Act and one based upon the Constitution or urge that the case be decided on this alternative statutory ground.[11] As recently noted by Mr. Justice

(footnote continued)

deny the appellants' motion to dismiss based on the alleged "unclean hands" of the appellees. (J.A. 22a-26a.) At the least, any factual issues relating to these matters that might be thought to bear on the merits of the case should be resolved, in the first instance, in the trial court and not, as the appellees would have it, in this Court.

[11] Although the appellees contend that the district court "held that section 2 establishes a private cause of action" (Appellees' Br. 12) the "holding" of the court was only in ruling on a preliminary motion to dismiss and had no bearing on its ultimate decision on the merits. (See J.A. 83a.) Moreover, in contrast to their position in this Court, the appellees gave no clue to the district court or to the court of appeals that they understood their alleged "private" rights under Section 2 to be broader than their constitutional rights.

Powell in *Regents of the University of California* v. *Bakke*, 98 S.Ct. 2733, 2745 (1978), "this Court has been hesitant to review questions not addressed below," citing *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430 (1940), *Massachusetts* v. *Westcott*, 431 U.S. 322 (1977) (*per curiam*), and *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969).

Moreover, both the existence of the appellees' claimed private right of action under Section 2 of the Voting Rights Act and its breadth are subject to serious doubts. At most, any private right of action under Section 2 tracks rights granted by the Fifteenth Amendment, and we have shown that such rights are subject to the very requirement of purposeful discrimination that the appellees have failed to satisfy in this case.

First, there is serious doubt that there is any private right of action under Section 2. The appellees cite no decided case in which such a private right of action has been recognized; neither do they cite any legislative history of the original 1965 Voting Rights Act. They rely exclusively on a statement by a sponsor of the 1975 amendments to the Act, who made a passing reference to the possibility of private actions under Section 2, among other statutes. (Appellees' Br. 13 n.3.) But this remark was not addressed to any amendment to Section 2. It was made in the course of the consideration of Section 401 of the 1975 Extension of the Voting Rights Act, which amended Section 3 of the Act, 42 U.S.C. § 1973a, to provide that "an aggrieved person" as well as the Attorney General should have the right to equitable remedies contained in the Act upon the successful prosecution of "a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment . . . ." Moreover, taken as a whole, the legislative history of the 1975 Extension leaves doubt whether the single reference

upon which the appellees rely accurately expresses the Congress' view of the existence of a private right of action under Section 2 of the 1965 Voting Rights Act. *See, e.g.*, H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 43 (1975); *id* at 105-06 (Supplemental views); S. Rep. No. 94-295, 94th Cong., 1st Sess. 9 (1975).

But more importantly, both the language of Section 2 of the 1965 Voting Rights Act and the legislative history of the 1975 Extension make it plain that, if a private right of action may be inferred from Section 2, it is no broader than the rights provided by the Fourteenth and Fifteenth Amendments. Indeed the relevant language of Section 2 closely tracks that of the Fifteenth Amendment, and what scant legislative history there is suggests that Section 2 was included in the Voting Rights Act of 1965 as a kind of "preamble" to make the basic guarantees of the Fifteenth Amendment apparent on the face of this implementing legislation. *See* 111 Cong. Rec. 10851 (1965) (remarks of Senator Stennis, an opponent of the bill); *Hearings on S. 1564 Before the Senate Judiciary Committee*, 89th Cong., 1st Sess., pt. 1 at 172, 208 (1965) (remarks of Senator Dirksen, a co-sponsor of the legislation). There is no indication in the legislative history that Congress intended private actions arising under the Voting Rights Act to permit enforcement of rights broader than those guaranteed by the Fifteenth Amendment—the rights that the Act was intended to effectuate. *See South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *United States* v. *Mississippi*, 380 U.S. 128 (1965). The purposes of the Court's policy of avoiding constitutional issues by deciding statutory issues would therefore not be served by reaching out to decide this case on the basis of Section 2.

The appellees arrive at their contrary conclusion that Section 2 of the Voting Rights Act of 1965 provides rights

broader than those under the Constitution by claiming that the literal language of Section 2 can be understood only by reference to the terms of Section 5 of the same act. Section 2 provides:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

The appellees reason, drawing on their brief in the City of Mobile's case, No. 77-1844, that, although the term "on account of" may suggest that a racially discriminatory motive is required for a violation of Section 2, the term may be disregarded because the same three words appear in Section 5, and in Section 5 the Attorney General is granted broad powers concerning changes in voting practices or procedures in certain jurisdictions that may have the "purpose ... or ... effect" of denying or abridging the right to vote.

This argument is utterly unpersuasive. First, it overlooks the fact that these same three words—"on account of"—are in the Fifteenth Amendment itself. Given the similarity in language, the obvious inference is that Congress intended the words "on account of" in Section 2 to have the same meaning as in the Fifteenth Amendment, an inference supported by the scant legislative history of Section 2. *See, e.g., Hearings on S. 1564, supra* at 208 ("[S]ection 2 ... is almost a rephrasing of the 15th amendment ...") (remarks of Senator Dirksen). Further, the use of the "purpose ... or ... effect" language in Section 5, which section was part of "an unusual, and in some aspects a severe, procedure" to enforce the Fifteenth Amendment, *Allen* v. *Board of Elections*, 393 U.S. 544, 556 (1969), implies, by common

canons of statutory construction, that Congress meant something different in Section 2, where it used different language. *See e.g., National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974); 2A Sands, *Sutherland Statutory Construction* § 47.23 (4th ed. 1973).

In short, the appellees' arguments premised on Section 2 of the Voting Rights Act are belated and strained efforts to avoid the effects of their failure to prove their case under the Fourteenth and Fifteenth Amendments as construed by this Court.

CONCLUSION

For the reasons stated here and in our opening brief, the judgment below should be reversed and the case should be remanded to the district court to restore a school board whose members are elected from Mobile County at large pursuant to the governing state statutes.

Respectfully submitted,

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